Gulf Asia Oils and Fats Sdn Bhd v Able Food Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-596–11 OF 2018
AHMAD FAIRUZ JC
15 MAY 2019

Civil Procedure — Injunction — Fortuna injunction — Application for declaration of notice under s 466 of the Companies Act as null and void — Whether notice under s 466 notice was valid — Whether judgment required before notice under s 466 issued — Whether there was bona fide dispute of debt — Whether there was certainty of claim — Whether injunction to restrain defendants was considered — Companies Act 2016 ss 465 & 466

This was an application for a declaration that a notice issued by the defendants to the plaintiff under s 466 of the Companies Act 2016 ('the Act') was null and void and for a Fortuna injunction to restrain the defendants from presenting a winding up petition under s 465 of the Act against the plaintiff. The plaintiff was a trading company. The first defendant traded in dry milk powder whilst the second defendant traded in sweetened condensed milk and evaporated milk. In the years from 2014–2016, the plaintiff started to have business dealings with the first defendant, second defendant and a company known as Able Perfect Sdn Bhd ('Able Perfect') for trading and dealing in milk related products and palm oil related products. The first defendant had sold and delivered milk powder to the plaintiff amounting to USD2,932,671.93. The plaintiff issued audited confirmation admitting owing USD2,932,671.93 to the first defendant as at 31 December 2016. The second defendant had sold and delivered sweetened condensed milk and evaporated milk to the plaintiff amounting to USD527,693.30. The plaintiff issued audit confirmation admitting owing of USD527,693.30 to the second defendant. On 19 December 2017, the plaintiff entered into a settlement agreement with the defendants to pay USD3,460,365.23 by 41 weekly installments ('the first settlement agreement'). The plaintiff paid USD391,000 and thereafter failed to pay the remaining sums. On 28 November 2017, the defendants filed a suit in the Kuala Lumpur High Court ('the 481 Suit') against the plaintiff and two others for USD3,069,365.23. The defendants then filed notice of discontinuance on 12 April 2018 to withdraw the 481 Suit in consideration that the plaintiff agreed to pay the defendants RM6,036,800 ('the settlement sum') as full and final settlement of all the monies owing by the plaintiff to the defendants which were the subject matter of the 481 Suit ('the final settlement agreement'). However, no payment was made by the plaintiff resulting in the defendants' solicitor issuing a letter of demand on 13 June 2018. The allegations made by the plaintiff were denied by the defendants by a letter dated

6 July 2018. On 23 October 2018, a notice pursuant to s 466 of the Act for the settlement sum was served by the defendants to the plaintiff ('the s 466 notice'). The defendants' solicitors then received a letter from the solicitors for the plaintiff, alleging that the s 466 notice was defective and that there was genuine disputes as to the settlement sum. The defendants' solicitors replied the letter and denied such allegations. The plaintiff thus filed the present suit. The issues by the plaintiff were: (a) whether s 466 notice was valid; (b) whether a judgment was required before a s 466 notice was issued; (c) whether there was a bona fide dispute of debt; (d) whether there was certainty of claim; and (e) whether an injunction to restrain the defendants was considered.

Held, dismissing the plaintiff's application with costs of RM5,000:

(1) There was no reason to rule the said s 466 notice was invalid for non-compliance with any particular rule or provision of law. There was no standard form or format that needed to be followed in the drafting of a s 466 notice. So long as the notice was made in writing, stating in clear terms the amount due and served on the company by leaving it at its registered office, the notice was valid. As such, there was no merit to the plaintiff's argument that notice was defective or invalid (see para 36).

(2) It was acknowledged by the Court of Appeal in *Syarikat Mohd Nor Yusof Sdn Bhd v Polibina Engineering Enterprise Sdn Bhd (in liquidation)* [2006] 1 MLJ 446 that there was no requirement for a petitioner to have a judgment debt prior to the filing of a petition to wind up the company. As such, the court found that despite no judgment debt, the s 466 notice issued by the defendants was not in any manner in error or defective (see paras 39–40).

(3) The court was of the opinion that the credit notes did not raise any grounds to defeat the claim made by the defendants. The failure to raise the credit notes early had supported the argument that the credit notes were nothing more than an afterthought brought up to derail the demand made by the defendants. It was an attempt to demonstrate that there was a bona fide dispute of debt. The credit notes were issued in September and October 2016 and was only raised as an issue in June 2018. Given that the credit notes existed as early as September 2016, an attempt to raise them only after formal demands were made by the defendants in 2018 meant that there was no real concern to do so. There was no urgency on the part of the plaintiff suggesting that it might not have been important to raise it immediately. As such, raising the credit notes in 2018 was a belated act on the part of the plaintiff. Upon an examination of the timeline of the dispute and the events that followed during the attempts to resolve the claim, no such set off or deductions arising from the credit notes were raised. Failure to raise the credit notes during the course of negotiations was fatal to the claim that the notes

were relevant to the disputed sums. Failure of the plaintiff to offer any rebuttal evidence on this fact weakened the argument that there was a bona fide dispute of debt. Even if the court was to consider the credit notes, it must remind itself that the notes originated from a different entity. It was not issued by the defendants. Able Perfect was not a contracting party between the plaintiff and the defendants which gave rise to the debt due and owing as explained in the relevant affidavits (see paras 48–49 & 52).

(4) Such contradictory and conflicting claims on the part of the plaintiff worked against the plaintiff. It was especially so when the defendants had demonstrated with precision how they derived the total sum claimed. Allegations by a deponent that were in contradiction to his sworn statement allegations which in turn were in dispute with contemporary documents should be ignored entirely. The court was satisfied that the plaintiff failed to demonstrate that the said s 466 notice was as null and void. There was clearly a debt established by the defendants that gave rise to the notice. There was no disputed debt (see paras 55 & 56).

(5) The plaintiff failed to establish a case for a Fortuna injunction. The plaintiff failed to adduce any arguments to show the requirements established in *Pacific and Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217 had been fulfilled. The plaintiff failed to establish a prima facie case as it did not show a bona fide dispute of the statutory demand. The s 466 notice was regularly issued and the debt was not a disputed debt. The solvency of the company while claimed as a non-issue by the plaintiff was not reflected in their actions. It was clearly established that the plaintiff had failed to honour two settlement agreements. No evidence was put forward that the said agreements were in any manner defective or unenforceable. It was plain refusal to abide by the agreement. As such, by conduct, the plaintiff demonstrated that they did not want to pay. The logical deduction based on this refusal to pay was that plaintiff was unable to pay. What was clearly established was the fact that despite the defendants offering a reduction from the original amounts claimed, yet the plaintiff failed to honour the agreements. The plaintiff had not established why it was entitled to any form of injunctive relief. As such, there was no basis for the court to grant the consequential prayer sought by the plaintiff (see paras 59, 62–65 & 69–70).

[Bahasa Malaysia summary

Ini adalah permohonan untuk mendapatkan suatu deklarasi bahawa notis yang dikeluarkan oleh defendan kepada plaintif di bawah s 466 Akta Syarikat 2016 ('Akta tersebut') adalah tidak sah dan terbatal dan untuk injuksi Fortuna bagi menghalang defendan daripada menyerahkan petisyen penggulungan di bawah s 465 Akta tersebut terhadap plaintif. Plaintif adalah syarikat perdagangan. Defendan pertama menjalankan perdagangan susu tepung

manakala defendan kedua menjalankan perdagangan susu pekat manis dan susu sejat. Di antara tahun 2014 dan 2016, plaintif telah memulakan perniagaan berurusan dengan defendan pertama, defendan kedua dan sebuah syarikat yang dikenali sebagai Able Perfect Sdn Bhd ('Able Perfect') dalam dagangan dan urusan berkaitan dengan produk tenusu dan produk kelapa sawit. Defendan pertama telah menjual dan menghantar susu tepung kepada plaintif berjumlah USD2,932,671.93. Plaintif telah mengeluarkan pengesahan pengauditan mengakui berhutang sebanyak USD2,932,671.93 kepada defendan pertama setakat 31 Disember 2016. Defendan kedua telah menjual dan menyerahkan susu pekat manis dan susu sejat kepada plaintif berjumlah USD527,693.30. Plaintif telah mengeluarkan pengesahan pengauditan mengakui berhutang sebanyak USD527,693.30 kepada defendan kedua. Pada 19 Disember 2017, plaintif telah memasuki perjanjian persetujuan dengan defendan-defendan untuk membayar USD3,460,365.23 secara ansuran selama 41 minggu ('perjanjian persetujuan pertama'). Plaintif membayar USD391,000 dan kemudianya gagal untuk menjelaskan jumlah baki. Pada 28 November 2017, defendan memfailkan tuntutan di Mahkamah Kuala Lumpur ('Saman 481') terhadap plaintif dan dua yang lain untuk USD3,069,365.23. Defendan-defendan kemudiannya memfailkan notis pemberhentian pada 12 April 2018 untuk menarik balik Saman 481 di atas balasan bahawa plaintif bersetuju untuk membayar kepada defendan-defendan RM6,036,800 ('jumlah penyelesaian') sebagai penyelesaian penuh dan muktamad bagi kesemua wang plaintif yang telah berhutang kepada defendan-defendan yang menjadi asas tuntutan Saman 481 ('perjanjian penyelesaian akhir'). Walau bagaimanapun, tiada sebarang pembayaran telah dibuat oleh plaintif yang menyebabkan peguamcara defendan-defendan mengeluarkan surat tuntutan bertarikh 6 Julai 2018. Pada 23 Oktober 2018, notis di bawah s 466 Akta tersebut terhadap jumlah penyelesaian penuh telah diserahkan oleh defendan-defendan kepada plaintif ('notis s 466 tersebut'). Peguamcara defendan-defendan kemudianya menerima surat daripada peguamcara plaintif, mendakwa bahawa notis s 466 adalah cacat dan terdapat pertikaian yang tulen terhadap jumlah penyelesaian penuh. Peguamcara defendan-defendan menjawab surat tersebut dan menafikan segala dakwaan. Plaintif seterusnya memfailkan tuntutan ini. Isu-isu oleh plaintif adalah: (a) sama ada notis s 466 adalah sah; (b) sama ada penghakiman telah diperolehi sebelum notis s 466 dikeluarkan; (c) sama ada terdapat pertikaian bona fide terhadap hutang; (d) sama ada terdapat kepastian terhadap tuntutan; dan (e) sama ada injuksi untuk menghalang defedan-defendan telah dipertimbangkan.

Diputuskan, menolak permohonan plaintif dengan kos sebanyak RM5,000:

(1) Tiada alasan untuk memutuskan notis s 466 adalah tidak sah kerana tidak mematuhi sebarang peruntukan undang-undang. Tiada bentuk standard atau format yang perlu diikuti ketika menyediakan notis s 466.

Selagi notis tersebut dibuat secara bertulis, menyatakan dengan jelas jumlah keberhutangan dan diserahkan kepada syarikat dengan cara meninggalkan di pejabat berdaftar, notis tersebut adalah sah. Oleh itu, pernyataan plaintif bahawa notis tersebut cacat dan tidak sah adalah tidak bermerit (lihat perenggan 36).

(2) Ianya telah diputuskan oleh Mahkamah Rayuan dalam *Syarikat Mohd Nor Yusof Sdn Bhd v Polibina Engineering Enterprise Sdn Bhd (in liquidation)* [2006] 1 MLJ 446 bahawa tidak ada keperluan untuk pempetisyen untuk mendapatkan penghakiman ingkar terlebih dahulu sebelum memfailkan petisyen penggulungan syarikat. Oleh itu, mahkamah mendapati walaupun tiada penghakiman ingkar, notis s 466 yang dikeluarkan oleh defendan-defendan adalah sama sekali tidak terbatal atau cacat (lihat perenggan 39–40).

(3) Mahkamah berpendapat bahawa nota kredit tidak membangkitkan sebarang alasan untuk menolak tuntutan yang dibuat oleh defendan-defendan. Kegagalan untuk membangkitkan nota kredit lebih awal untuk menyokong pernyataan bahawa nota kredit adalah tidak lain hanyalah pemikiran semula yang dibangkitkan untuk menghalang tuntutan yang dibuat oleh defendan. Ianya adalah cubaan untuk menunjukkan terdapat pertikaian bona fide hutang tersebut. Nota kredit telah dikeluarkan pada September dan Oktober 2016 dan hanya dibangkitkan sebagai isu pada Jun 2018. Memandangkan nota kredit telah wujud seawal September 2016, cubaan untuk membangkitkannya setelah terdapat tuntutan rasmi oleh defendan-defendan pada 2018 menunjukkan bahawa ianya tidak penting untuk dibuat. Tidak ada kesegeraan oleh plaintif menunjukkan bahawa ianya adalah tidak penting untuk dibangkitkan dengan segera. Oleh itu, membangkitkan nota kredit pada 2018 adalah tindakan yang lewat oleh plaintif. Setelah memeriksa garis masa dan kejadian yang berlaku ketika cubaan untuk menyelesaikan tuntutan, tiada sebarang pelepasan atau pengurangan daripada nota kredit dibangkitkan. Kegagalan untuk membangkitkan nota kredit ketika rundingan adalah membawa padah kepada tuntutan memandangkan nota tersebut ada relevan kepada jumlah yang dipertikaikan. Kegagalan plaintif untuk menawarkan keterangan untuk menyangkal fakta ini telah melemahkan dakwaan bahawa terdapat pertikaian yang bona fide terhadap hutang tersebut. Jika sekiranya mahkamah ingin mengambil kira nota kredit tersebut, perlu diingatkan bahawa nota tersebut berasal daripada pihak-pihak yang mempunyai perjanjian di antara plaintif dan defendan-defendan yang membangkitkan bahawa terdapat hutang yang perlu dibayar melalui affidavit-afidavit tertentu (lihat perenggan 48–49 & 52).

(4) Tuntutan yang bertentangan dan bercanggah oleh plaintif telah memberikan kesan kepada plaintif. Ianya adalah disebabkan oleh apabila

defendan-defendan menunjukkan dengan tepat bagaimana mereka boleh mendapatkan jumlah tuntutan. Dakwaan oleh deponen yang bercanggah dengan pernyataan bersumpah beliau yang mana bertentanagn dengan dokumen semasa haruslah tidak dilayan sama sekali. Mahkamah telah berpuas hati bahawa plaintif gagal untuk menunjukkan bahawa notis s 466 tersebut adalah tidak sah dan terbatal. Ianya dengan jelas terdapat hutang yang dikemukakan oleh defendan yang membangkitkan notis tersebut. ianya bukan hutang yang dipertikaikan (see perenggan 55–56).

(5) Plaintif gagal untuk membentuk kes ntuk injuksi Fortuna. Plaintif gagal untuk mengemukakan sebarang pernyataan untuk menunjukkan keperluan seperti di dalam *Pacific and Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217 yang harus dipenuhi. Plaintif gagal untuk membuktikan kes prima facie kerana ianya tidak menunjukkan pertikaian bona fide terhadap tuntutan statutori. Notis s 466 telah dikeluarkan secara sempurna dan hutang adalah bukan hutang yang dipertikaikan. Kesolvenan syarikat ketika tuntutan adalah bukan isu bagi plaintif yang mana tidak dizahirkan oleh tindakan mereka. Ianya dengan jelas telah dibuktikan bahawa plaintif gagal untuk memenuhi kedua-dua perjanjian penyelesaian. Tiada keterangan yang dikemukakan yang menyatakan bahawa perjanjian-perjanjian tersebut adalah cacat dan tidak boleh dikuatkuasakan. Ianya adalah keengganan biasa untuk tidak mematuhi perjanjian. Oleh itu, berdasarkan tingkahlaku, plaintif telah menunjukkan bahawa mereka tidak mahu membayar. Kesimpulan yang logik berdasarkan keengganan untuk membayar adalah plaintif tidak mampu untuk membayar. Apa yang jelas telah dibuktikan adalah fakta bahawa walaupun defendan-defendan telah menawarkan pengurangan daripada jumlah tuntutan yang asal, plaintif masih lagi gagal untuk mematuhi perjanjian-perjanjian tersebut. Plaintif tidak membuktikan kenapa ia berhak untuk sebarang bentuk relif injuksi. Oleh sebab itu, tiada asass untuk mahkamah membenarkan permohonan yang dibangkitkan oleh plaintif (lihat perenggan 59, 62–65 & 69–70).]

Notes

For cases on fortuna injunction, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4196–4200.

Cases referred to

Adventist Health Services (M) Sdn Bhd & Ors v Teddric Jon Mohr [2014] 11 MLJ 771, HC (refd)

Aeon Big (M) Sdn Bhd v SSM Management Sdn Bhd [2017] MLJU 1824; [2017] 1 LNS 998, HC (refd)

American Cynamid Co v Ethicon Ltd [1975] AC 396, HL (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)
Cheng Teck Chor v Cheng Hooi Chor [2015] MLJU 1122, HC (refd)
Fortuna Holdings Pty Ltd v Deputy Federal Commissioner of Taxation [1978] VR 83, SC (refd)
Klass Corp (M) Sdn Bhd v MKRS Management Sdn Bhd [2018] 9 MLJ 305; [2018] 7 CLJ 303 (refd)
Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd [2012] 6 MLJ 817, CA (refd)
Lai Yak Kee v Pembinaan Cemerlang Sdn Bhd [2012] 1 LNS 1464, FC (refd)
Mackt Logistics (M) Sdn Bhd v Malaysian Airline System Bhd [2014] 2 MLJ 518, CA (refd)
Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187; [2001] 3 CLJ 248, CA (refd)
Molop Corp Sdn Bhd v Uniperkasa (M) Sdn Bhd [2003] 6 MLJ 311, HC (refd)
Pacific and Orient Insurance Co Bhd v Muniammah Muniandy [2010] MLJU 2217, CA (refd)
Pembinaan Lian Keong Sdn Bhd v Yip Fook Thai (practising as Messrs Yip & Co) [2005] 5 MLJ 786, HC (refd)
Sagujuta (Sabah) Sdn Bhd v Trane Malaysia Sales & Services Sdn Bhd [2014] 5 MLJ 535; [2013] 1 LNS 1425, CA (refd)
Seremban Engineering Bhd v Nandakumar a/l Perumal (trading under the name and style of New Trax Resources) [2016] 9 MLJ 656, HC (refd)
Syarikat Mohd Noor Yusof Sdn Bhd v Polibina Engineering Enterprise Sdn Bhd (in liquidation) [2006] 1 MLJ 446, HC (refd)
Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd [2007] 4 MLJ 355, CA (refd)
Union Tech Automation Sdn Bhd v ES Precision Engineering [2017] MLJU 254; [2017] 1 LNS 163, CA (refd)
Westform Far East Sdn Bhd v Connaught Heights Sdn Bhd and other appeals [2010] 3 MLJ 459, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016) s 218(2)(a)
Companies Act 2016 ss 465, 466

Chong lan Shin (Arulampalam & Co) for the plaintiff.
Richard Kok Chi Wei (Tan Ko Xin with him) (Rhiza & Richard) for the defendants.

Ahmad Fairuz JC:

INTRODUCTION

[1] This is an application for a declaration that a notice issued by the defendants to the plaintiff under s 466 of the Companies Act 2016 is null and void and for a fortuna injunction to restrain the defendants from presenting a

winding up petition under s 465 of the Companies Act 2016 against the plaintiff. At the conclusion of the hearing, this court dismissed the application. The following is the grounds of judgment of this court.

BACKGROUND OF THE CASE

[2] The plaintiff is a trading company. The first defendant trades in dry milk powder whilst the second defendant trades in sweetened condensed milk and evaporated milk.

[3] In the years from 2014–2016, the plaintiff started to have business dealings with the first defendant, second defendant and a company known as Able Perfect Sdn Bhd (629266-V) ('Able Perfect') for trading and dealing in milk related products and palm oil related products.

[4] The first defendant had sold and delivered milk powder to the plaintiff amounting to USD2,932,671.93. The plaintiff issued audited confirmation admitting owing USD2,932,671.93 to the first defendant as at 31 December 2016.

[5] The second defendant had sold and delivered sweetened condensed milk and evaporated milk to the plaintiff amounting to USD527,693.30. The plaintiff issued audit confirmation admitting owing of USD527,693.30 to the second defendant.

[6] On 19 December 2017, the plaintiff entered into a settlement agreement with the defendants to pay USD3,460,365.23 by 41 weekly installments ('the first settlement agreement'). The plaintiff paid USD391,000 and thereafter failed to pay the remaining sums.

[7] On 28 November 2017, the defendants filed a suit in the Kuala Lumpur High Court in Suit No WA-22NCC-481–12 of 2017 ('the 481 Suit') against, the plaintiff and two others for USD3,069,365.23.

[8] The defendants then filed notice of discontinuance on 12 April 2018 to withdraw the 481 Suit in consideration that the plaintiff agreed to pay the defendants RM6,036,800 ('the settlement sum') as full and final settlement of all the monies owing by the plaintiff to the defendants which were the subject matter of the 481 Suit ('the final settlement agreement').

[9] However, no payment was made by the defendants resulting in the defendants' solicitor issuing a letter of demand on 13 June 2018. On 22 June 2018, in reply, the plaintiff's solicitor alleged the following:

A 1. Our Client has a long standing business relationship with Able Food Sdn. Bhd. ('AFSB'), Able Diaries Sdn. Bhd. ('ADSB') and Able Perfects Sdn. Bhd. ('APSB').

2. At all material times, our Client had made to understand that AFSB, ADSB and APSB are under the same control and management. Our Client had further been made to understand that payments due to AFSB and APSB can be made to anyone B of them.

3. During the period of April 2016 until October 2016, APSB had issued Credit Notes for goods sold and delivered to our Client and after netting off the invoices, there is still a sum of USD 3, 471, 707. 32 due and owing to our Client.

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[10] The above allegations are denied by the defendants by a letter dated 6 July 2018.

[11] On 23 October 2018, a notice pursuant to s 466 of the Companies Act D 2016 ('the Act') for the settlement sum was served by the defendants to the plaintiff ('the s 466 notice').

[12] The defendants' solicitors then received a letter from the solicitors for E the plaintiff, alleging that the s 466 notice was defective and that there was genuine disputes as to the settlement sum. The defendants' solicitors replied the letter and denied such allegations.

[13] Thus, the plaintiff filed the present suit.

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THE PLAINTIFF'S SUBMISSION

[14] It was argued by the plaintiff that at all material times, the plaintiff was made to understand that the first defendant, the second defendant, Able G Perfect and Able Perfect Pte Ltd ('the Able Group') share a common director and shareholder and are under the same management and control. The plaintiff also was made to understand that payments due to the first defendant, the second defendant and Able Perfect can be made to the Able Group collectively.

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[15] The plaintiff submitted that when the 481 Suit was filed by the defendants, the plaintiff was also in negotiation with Able Perfect and had on numerous occasions requested Able Perfect to provide statement of account for the year 2016 onwards for the plaintiff to enable the plaintiff to finalise the I exact outstanding sums due and owing by Able Perfect to the plaintiff and thereafter to net off against the sum owing between Able Group collectively and the plaintiff.

[16] Nonetheless, the plaintiff contended that it had entered into the first

settlement agreement on a without prejudice basis and without admission of any liability.

[17] It was pointed out by the plaintiff that during the period of April 2016 until January 2017, Able Perfect had issued 16 credit notes to the plaintiff in the total sum of USD16,802,236.33 for the goods sold and delivered to the plaintiff and to reflect the sum to be refunded to the plaintiff for the numerous sale orders placed by the plaintiff.

[18] The plaintiff contended that the amount of RM6,036,800 demanded by the defendants is not a sum claimed pursuant to a judgment and not a judgment debt. The plaintiff highlighted to the court that when the sum demanded is not a judgment debt and the debt claimed is bona fide disputed by the plaintiff on a substantial ground, an injunction will be given to prevent the defendants from presenting a winding-up petition.

[19] It was submitted further that the proper course of action is for the defendants to file a writ action and to finalise the issues of the dispute in the said writ action. The plaintiff referred to a number of authorities, which in support of its application such as the Court of Appeal decision in *Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd* [2007] 4 MLJ 355, *Westform Far East Sdn Bhd v Connaught Heights Sdn Bhd and other appeals* [2010] 3 MLJ 459 as well as High Court cases of *Syarikat Mohd Noor Yusof Sdn Bhd v Polibina Engineering Enterprise Sdn Bhd (in liquidation)* [2006] 1 MLJ 446, *Pembinaan Lian Keong Sdn Bhd v Yip Fook Thai (practising as Messrs Yip & Co)* [2005] 5 MLJ 786, *Molop Corp Sdn Bhd v Uniperkasa (M) Sdn Bhd* [2003] 6 MLJ 311 and *Seremban Engineering Bhd v Nandakumar a/l Perumal (trading under the name and style of New Trax Resources)* [2016] 9 MLJ 656.

[20] It was also pointed out by the plaintiff that it is commercially solvent. The only evidence of insolvency adduced by the defendants is a summary of financial information obtained from the Companies Commission of Malaysia for year 2017. Nonetheless, it was submitted that the plaintiff was able to garner the profits of RM36,908,469.02 as of 30 November 2018. To date, the plaintiff is still active in business.

THE DEFENDANTS' SUBMISSION

[21] The defendants highlighted to the court that an injunction sought by the plaintiff is premised on the court declaring the s 466 notice to be invalid. The defendants argued that a perusal of s 466 notice shows that it has fulfilled all the requirements to be a valid notice. The demand was in writing issued by the defendants' solicitor, it specified the sum due and it was left at the plaintiff's registered office. To support this contention, the defendants cited a Federal

A Court decision in *Lai Yak Kee v Pembinaan Cemerlang Sdn Bhd* [2012] 1 LNS 1464.

[22] It was submitted further that there is no bona fide dispute on the sums owed by the plaintiff to the defendants for the following reasons:

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(a) the figures claimed by the defendants was based on the final settlement agreement, executed by both parties and never been challenged by the plaintiff; and

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(b) it is immaterial whether the defendants has a judgment or otherwise. In this case, the final settlement agreement is as good as a consent judgment.

[23] The defendants averred that the plaintiff's allegations regarding the purported dispute with Able Perfect is not bona fide and merely an afterthought. These allegation were only raised after the final settlement agreement when the defendants demanded for the settlement sum.

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[24] It was also contended that the plaintiff's attempt to set off the settlement sum with the sum allegedly owing to it by Able Perfect is a futile exercise given that it is against the notion of separate legal entity. Able Perfect while being in the Able Group is a separate entity.

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[25] It was highlighted to the court that there are inconsistent allegations in the plaintiff's affidavit and affidavit in reply as to the amount allegedly owed by Able Perfect to the plaintiff in which both affidavits are sworn by the same deponent. In its affidavit, the plaintiff alleged that there is a sum of USD3,471,707.32 due and owing by Able Perfect to the plaintiff. However, in the affidavit in reply, the plaintiff alleged that the correct amount is USD16,802,236.33. This discrepancy, as submitted by the defendants, clearly shows an afterthought on the plaintiff's part and ought to be disbelieved in toto.

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[26] The defendants also argued that the plaintiff has failed to adduce any documentary evidence to prove that the plaintiff's profit as at 30 November 2018 is in the sum of RM36,908,469.02. It is trite that any company contending that it is solvent must produce its latest audited financial statements to said so.

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I ANALYSIS

[27] It is essential to understand the background of the dispute. Foremost, is to determine how the debt or sums claimed to be owing arose. This eventually resulted in the issuance of the statutory demand under s 466 of the Act.

[28] It is perhaps appropriate to begin with the audit confirmation sought by the plaintiff's auditors from both the defendants. This can be seen in the affidavit in support of Oh Teck Huat at OTH1. From the said exhibit, by an audit exercise on 12 May 2017, the plaintiff owed the first defendant a sum of USD2,932,671.93 and the second defendant, a sum of USD527,693.30. Therefore, it can be concluded by this court that as at 12 May 2017, a total sum of USD3,460,365.23 was owed collectively by the plaintiff to both the first and second defendants. A pertinent point to note is that the confirmation was sought by the plaintiff's auditors. This fact was not challenged by the plaintiff and stands unrebutted.

[29] The next issue to determine was whether they were steps to resolve the sums owing by the plaintiff to the defendants. Based on the affidavit in support of the defendants, it can be gleaned that the plaintiff attempted to resolve the debts by entering into the first settlement agreement dated 19 December 2017 in which the plaintiff agreed to pay the sum of USD3,460,365.23 by way of several payments. However, except for a payment of USD391,000, nothing else was paid by the plaintiff.

[30] The defendants then filed the 481 Suit at the Kuala Lumpur High Court seeking for the balance of the amounts due under the first settlement agreement for an amount of USD3,069,365.23. It was factually established that solicitors for the plaintiff then sought to resolve the claim by negotiating with the defendants for a final settlement to be recorded between the parties. The negotiations culminated in the plaintiff agreeing to pay a sum of RM6,036,800 as full and final settlement of the sums due. This amount represented a discount of 50% from the original amount due to the defendants. Upon executing the final settlement agreement, the defendants withdrew the suit. Thereafter the plaintiff failed to honour the final settlement agreement when it did not pay the amounts agreed under the agreement.

[31] This court finds it as a fact that a sum of RM6,036,800 was due and owing to the defendants. The defendants therefore cannot be faulted when it commenced an action by issuing the s 466 notice.

Whether the s 466 notice was valid

[32] The first prayer in the plaintiff's application sought to declare that the s 466 notice was incorrect under the law and/or null and/or void.

[33] The defendants in this suit argued that the plaintiff failed to demonstrate how the s 466 notice was defective and invalid. The defendants argued that there was only a bare and unsubstantiated allegation made by the plaintiff in asserting the challenge.

[34] It is therefore, incumbent upon this court to examine if the said notice was in any manner defective rendering it to be null or void. On how a statutory notice is to be framed and worded, the principles outlined by the Federal Court decision of *Lai Yak Kee v Pembinaan Cemerlang Sdn Bhd* [2012] 1 LNS 1464 were as follows:

> [19] A closer and plain examination of s 218(2)(a) of the Act evokes the following imperatives which a creditor, to whom a company owes more than five hundred ringgit, can establish that the company is unable to pay its debts. For the demand to be effective it must comply with the prescribed requirements of the sub-section and these are as follows:
>
> (1) The demand must be in writing under the hand of the creditor or his authorised agent;
>
> (2) It must specify the sum due;
>
> (3) The demand must be served on the company by leaving it at its registered office.
>
> [20] *It is our considered view that if all the above-mentioned requirements are met, the demand is valid* (see the decision of this court in *United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd* [2000] 1 MLJ 385 at p 389; [2000] 1 CLJ 57). (Emphasis added.)

[35] The Federal Court in *Lai Yak Kee* was considering s 218(2)(a) of the Companies Act 1965 which is largely similar to s 466(1)(a) of the Act. This court is of the view that the s 466 notice issued by the defendants complied with the requirements established in *Lai Yak Kee*.

[36] Therefore this court does not find any reason to rule the said s 466 notice was invalid for non-compliance with any particular rule or provision of law. Clearly, there was no standard form or format that needs to be followed in the drafting of a s 466 notice. So long as the notice was made in writing, stating in clear terms the amount due and served on the company by leaving it at its registered office, the notice is valid. As such, there is no merit to the plaintiff's argument that notice was defective or invalid.

Whether a judgment is required before a s 466 notice is issued

[37] In *Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd* [2012] 6 MLJ 817, the Court of Appeal held that the following:

> a *creditor is not required to obtain a judgment before serving a statutory demand* ...' (*The Law of Company Liquidation* (4th Ed), by Andrew R Keay at p 83) and 'whether or not judgment had been obtained, an unpaid creditor is, as a general rule, entitled to a winding-up order against a company which is insolvent' (*The Law of Company Liquidation* (4th Ed), by Andrew R Keay at p 91). Where there is no judgment, it is not uncommon for companies to argue that the debt is disputed. But

'in order to oppose a winding up petition, the respondent must raise a bona fide dispute in both a subjective and objective sense. It must be honestly believed to exist and must be based on substantial or reasonable grounds — *BMC Construction Sdn Bhd v Dataran Rentas Sdn Bhd* [2001] 1 MLJ 356' (Chan & Koh on *Malaysian Company Law* (2nd Ed) at para 22.145). (Emphasis added.)

[38] Similarly, in *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187; [2001] 3 CLJ 248, Gopal Sri Ram JCA (as he then was) stated as follows:

But a petition for winding up is not execution. For a winding up petition is not based upon any judgment of a court. Normally, it is based on the inability of a company to pay its debts as and when they fall due. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s 218 of the Companies Act. But the issuance of such a notice is not a sine qua non for the presentation of a winding up petition. *What is needed is compelling evidence of the company's inability to pay its debts as and when they fall due.* (Emphasis added.)

[39] In *Syarikat Mohd Noor Yusof Sdn Bhd v Polibina Engineering Enterprise Sdn Bhd (in liquidation)* [2006] 1 MLJ 446. It was acknowledged by the Court of Appeal that there was no requirement for a petitioner to have a judgment debt prior to the filing of a petition to wind up a company. Ghazali Yusoff JCA held:

We are aware that it is not provided under the Act that a petitioner must be armed with a judgment debt prior to the filing of a petition to wind up a company. In the matter before us, there is no judgment debt and the debt claimed is disputed. We are of the view that a notice of indebtedness issued under s 218 of the Act is not evidence of the debt. (Emphasis added.)

[40] As such, this court finds that despite there being no judgment debt, the s 466 notice issued by the defendants was not in any manner in error or defective.

Whether there was a bona fide dispute of debt

[41] One of the major arguments put forward by the plaintiff is that there was a bona fide dispute of debt. Central to this argument was the issuance of credit notes by Able Perfect. It necessary to highlight the contention of the plaintiff again at this juncture to show the context of the argument made.

[42] The plaintiff highlighted that the defendants are part of the Able Group comprising of the two defendants and a third company Able Perfect. The plaintiff claimed that during the course of its dealings with the defendants, it was normal practice for the plaintiff to deal with the defendants as a group. It was contended that sometime in September and October 2016, Able Perfect

issued several credit notes to the plaintiff for the sum of approximately USD16m.

[43] It was contended by the plaintiff that the credit notes issued by Able Perfect entitled the plaintiff to offset any sums due to the defendants. The said credit notes would be more than sufficient to cover the outstanding sums due. As such, the amount demanded by the defendants under the s 466 notice was disputable. Thus, there was a bona fide dispute to the claim.

[44] The defendants responded by saying that the credit notes were only raised after the defendants' solicitors made a demand against the plaintiff in June 2018. It was argued that the reliance on the credit notes was an afterthought. The defendants demonstrated the timeline of the dispute and the exact time when the credit notes were raised as an issue.

[45] For ease of reference, the table demonstrating the chronological timeline of events which was produced in the defendants' submission is reproduced below:

NO	DATE	EVENT	FOUND AT
1.	Sept–October 2016	Able Perfect Sdn Bhd's Credit Note	
2.	11.10.2016	The Plaintiff confirmed owning USD2,932,671-93 to the 1st Defendant in a statement of account.	'OTH-1' of Defendants' Affidavit (page 2)
3.	31.12.2016	The Plaintiff confirmed owning USD2,932,671-93 to the 1st Defendant in a statement of account.	'OTH-1' of Defendants' Affidavit (page 1)
4.	12.5.2017	Audit Confirmation from Plaintiff's Auditor seeking confirmation from the 1st Defendant USD2,932,671-93 was owing by the Plaintiff to the 1st Defendant.	'OTH-1' of Defendants' Affidavit (page 3)
5.	19.1.2017	Audit Confirmation from Plaintiff's Auditor seeking confirmation from the 2nd Defendant USD2,932,671-93 was owing by the Plaintiff to the 2nd Defendant.	'OTH-1' of Defendants' Affidavit (page 4)

6.	19.1.2017	The Plaintiff entered into a settlement agreement with the Defendants to pay USD3,460,365-23 (being USD2,932,671-93 AND USD527,693-30) by weekly instalments ('the 1st Settlement Agreement')	'OTH-3' of Defendants' Affidavit
7.	28.11.2017	The Defendants filed a Suit No: WA-22NCC-481–11/2017 ('the Civil Suit') for USD3,069,365-23 (being USD3,460,365-23 less USD391,000-00 i.e approximately RM13.5 million ('the Claimed Sum')	'OTH-4' of Defendants' Affidavit
8.	21.1.2018	Marwan's Application to Strike Out on the ground that he did not personally promised to pay the Defendants. [Note: Able Perfect Credit Notes were not mentioned]	'OTH-6' and 'OTH-7' of Defendants' Affidavit
9.	7.2.2018	The Plaintiffs' Defence and Counterclaim alleging that it is not liable because Defendants had purportedly promised to supply to a company known as Asia Global Corporation Lts but did not. [Note: Able Perfect Credit Notes were not mentioned]	'OTH-5' of Defendants' Affidavit
10.	28.2.2018	The Plaintiff's Solicitors in the Civil Suit, wrote to the Defendants' solicitors proposing to settle the dispute. Draft Settlement Agreement attached. [Note: Able Perfect Credit Notes were not mentioned]	'OTH-10' of Defendants' Affidavit
11.	12.4.2018	Final Settlement Agreement whereby the Defendants would withdraw the Civil Suit in consideration of the Plaintiff paying RM6,036,800-00 after a discount nearly 50% from the claimed sum of approximately RM13.5 million ('the settlement sum'). [Note: Able Perfect Credit Notes were not mentioned]	'OTH-11' of Defendants' Affidavit

12.	12.4.2018	The Defendants filed a Notice of Discontinuance dated 6.4.2018 to withdraw the Civil Suit.	Exhibit 'OTH-12' of the Defendants' Affidavit
13.	3.5.2018	The Plaintiff agreed to the Defendants' proposed payment in schedule for the RM6,036,800-00 in the Final Settlement Agreement.	Exhibit 'OTH-13' of the Defendants' Affidavit
14.	14.5.2018	The Defendants reminder to the Plaintiff to pay the Settlement Sum.	Exhibit 'OTH-14' of the Defendants' Affidavit
15.	15.5.2018	The Plaintiff replied seeking time to pay due to delay to have funds as a result of the general election vacation. The plaintiff promised 1st instalment within that week.	Exhibit 'OTH-14' of the Defendants' Affidavit
16.	13.6.2018	The Defendants through their solicitors made a demand to the Plaintiff.	Exhibit 'OTH-16' of the Defendants' Affidavit

[46] It can be clearly seen that the contract notes were issued in September/October 2016. The plaintiff raised an issue about the contract notes after a demand was made by the defendants' solicitors on 13 June 2018. This clearly demonstrates the lack of sincere intention to deal fairly on the part of the plaintiff.

[47] This court is of the opinion that the credit notes did not raise any grounds to defeat the claim made by the defendants for the following reasons:

(a) the credit notes were issued in September and October 2016;

(b) the credit notes were at all material times available to the plaintiff during the course of the first settlement agreement and the final settlement agreement; and

(c) the credit notes were issued by a separate entity.

The credit notes were issued in September and October 2016

[48] This court is of the opinion at the failure to raise the credit notes early had supported the argument that the credit notes were nothing more than an afterthought brought up to derail the demand made by defendants. It was an attempt to demonstrate to this court that there was a bona fide dispute of debt. The credit notes were issued in September and October 2016. It was only raised as an issue in June 2018. Given that the credit notes existed as early as September 2016, an attempt to raise them only after formal demands were made by the defendants in 2018 meant that there was no real concern to do so. There was no urgency on the part of the plaintiff suggesting that it may not have been important to raise it immediately. As such, raising the credit notes in 2018 was a belated act on the part of the plaintiff.

The credit notes were at all material times available to the plaintiff during the course of the first settlement agreement and the final settlement agreement.

[49] Upon an examination of the timeline of the dispute and the events that followed during the attempts to resolve the claim, no such set off or deductions arising from the credit notes were raised. Failure to raise the credit notes during the course of negotiations was fatal to the claim that the notes were relevant to the disputed sums. Furthermore, failure of the plaintiff to offer any rebuttal evidence on this fact weakened the argument that there was a bona fide dispute of debt.

[50] A company cannot dispute the existence of an amount of debt if the company's own auditor had provided a confirmation of the amount owed pursuant to an audit confirmation exercise. In the Court of Appeal case of *Sagujuta (Sabah) Sdn Bhd v Trane Malaysia Sales & Services Sdn Bhd* [2014] 5 MLJ 535; [2013] 1 LNS 1425 at para 20, it was held as follows:

> 20. In short, the significance of the audit certification request can be seen from the statement contained therein. It specifically states that in the appellant's financial book, the amount due to the respondent is RM3,887,555.12. This is a clear admission of debt based on the amount stated as at the date 31 December 2010. *An audit confirmation request is an important step in an audit of a company's financial accounts. It is a way of ensuring that the amount as appears in the company's book is correct and the only manner to confirm this amount is by way of confirmation by the creditor concerned*. (Emphasis added.)

[51] See also *Union Tech Automation Sdn Bhd v ES Precision Engineering* [2017] MLJU 254; [2017] 1 LNS 163.

The credit notes were issued by a separate entity

[52] Even if this court is to consider the credit notes, it must remind itself that the notes originated from a different entity. It was not issued by the defendants. Able Perfect was not a contracting party between the plaintiff and defendants which gave rise to the debt due and owing as explained in the relevant affidavits.

[53] It is opportune to revisit the position of law with regards to how a company is to be treated despite it having common directors and shareholders. The case of *Mackt Logistics (M) Sdn Bhd v Malaysian Airline System Bhd* [2014] 2 MLJ 518 illustrates the point. It states as follows:

> [60] It is not disputed that the plaintiff and Mackt HWT Freight Sdn Bhd are different companies and are separate legal entities. *The fact that both the companies have common directors or shareholders do not negate the fact that both the companies are separate legal entities*. In this connection, it is germane to refer to the case of *Development & Commercial Bank Bhd v Lam Chuan Company & Anor* [1989] 1 MLJ 318, a decision of Abdul Malek bin Ahmad J (later the President of the Court of Appeal). His Lordship after referring to the *Salomon* principle aptly said at p 320 of the report:
>
> > *This was affirmed by the Court of Appeal. However, the House of Lords was of the view that the said limited company was perfectly lawful as a valid legal entity and it was absolutely separate and apart from Salomon himself. Lord Macnaghten had made the observation that the company is at law a different person altogether from the subscribers to the memorandum and though it may be after incorporation the business is precisely the same as it was before, the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them.*
>
> [61] Mohd Azmi SCJ delivering the judgment of the Supreme Court in *Hew Sook Ying v Hiw Tin Hee* [1992] 2 MLJ 189; [1992] 1 CLJ Rep 120 (SC) at p 199 (MLJ); p 127 (CLJ) alluded to the principle of incorporation in this way: *It is a well established principle of law that a limited company incorporated under the Companies Act and the individuals forming the company are distinct legal entities, however complete in control (might) be by one or more individuals of the company* (see *Salomon v Salomon & Company Ltd* [1897] AC 22) (see also *Tunstall v Steigman* [1962] 2 QB 593). (Emphasis added.)

Whether there was certainty of claim

[54] It was highlighted to the court that there are inconsistent allegations in the plaintiff's affidavit and affidavit in reply as to the amount allegedly owed by Able Perfect to the plaintiff in which both affidavits are sworn by the same deponent. In its affidavit, the plaintiff alleged that there is a sum of USD3,471,707.32 due and owing by Able Perfect to the plaintiff. However, in the affidavit in reply, the plaintiff alleged that the correct amount is

USD16,802,236.33. This discrepancy, as submitted by the defendants, clearly shows an afterthought on the plaintiff's part and ought to be disbelieved in toto.

[55] This court is of the view that such contradictory and conflicting claims on the part of the plaintiff works against the plaintiff. This is especially so when the defendants have demonstrated with precision how they derived the total sum claimed. Allegations by a deponent that are in contradiction to his sworn statement allegations (affidavits) which in turn are in dispute with contemporary documents should be ignored entirely (see *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; *Adventist Health Services (M) Sdn Bhd & Ors v Teddric Jon Mohr* [2014] 11 MLJ 771; *Cheng Teck Chor v Cheng Hooi Chor* [2015] MLJU 1122).

[56] Based on the above analysis, this court is satisfied that the plaintiff has failed to demonstrate that the said s 466 notice was as null and void. There was clearly a debt established by the defendants that gave rise to the notice. There was no disputed debt. Cases such *Lafarge Concrete* and *Syarikat Mohd Nor* clearly demonstrated that there is no judgment necessary before a statutory demand under s 466 notice was issued.

Whether an injunction to restrain the defendants ought to be considered by this court

[57] Although it was raised in the submissions of the defendants that the plaintiff had on 14 November 2018 declared that they were not seeking a Fortuna injunction, the reality of it is, it is one. The principles in seeking for such an injunction has its origins form the germane decision of *Fortuna Holdings Pty Ltd v Deputy Federal Commissioner of Taxation* [1978] VR 83.

[58] The Court of Appeal in *Pacific and Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217 summarised the test to be employed when a Fortuna injunction is being considered. It held as follows:

> [25] An application for an injunction to restrain an intended winding-up petition against a company is known as a 'Fortuna Injunction', taking its name from the case of *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation* [1978] VR 83. In that case the court laid down the basis on which a court acts to restrain the presentation of a winding-up petition and the two principles that guide courts in the grant of an injunction to that effect (see also *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295 (CA).
>
> [26] The first principle laid down in that case in that an injunction of that nature may be granted by court where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success. In order to succeed in getting injunction under this principle, the

applicant must satisfy both limbs of the principle ie,:

(i) the intended petition has no chance of success, as a matter of law as well as a matter of fact; and

(ii) the presentation of such petition (which has no chance of success) might produce irreparable damage to the company.

(See *Re A Company* [1894] 1 Ch 349; *Charles Forte Investment Ltd v Amanda* [1964] 1 Ch 240; [1963] 2 All ER 940; and *Bryanston Finance Ltd v De Vries (No 2)* [1976] 2 WLR 41; [1976] 1 All ER 25).

[59] It is the finding of this court that the plaintiff has failed to establish a case for a Fortuna injunction. The plaintiff failed to adduce any arguments to show the requirements established in *Pacific Orient Insurance Co* had been fulfilled.

[60] The plaintiff nevertheless, sought to argue that if there is a collateral purpose to wind up the company, namely to bring pressure to a company, a court is well empowered to restrain such a petition. Reliance was placed on the case of *Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd* [2007] 4 MLJ 355. Gopal Sri Ram JCA (as he then was) held as follows:

> When deciding whether to grant an injunction to restrain a petition that is based on a statutory demand for a debt, *the court must be satisfied that the debt is bona fide disputed on substantial grounds* (see *Stonegate Securities Ltd v Gregory* [1980] 1 All ER 241). *It is not enough that there is a serious question to be tried.*In other words, this is one of those cases to which the general test laid down in *American Cynamid Co v Ethicon Ltd* [1975] AC 396 does not apply. In *Molop Corp Sdn Bhd v Uniperkasa (M) Sdn Bhd* [2003] 6 MLJ 311, Low Hop Bing J (as he then was) correctly held as follows (at p 321): In *Natseven TV Sdn Bhd v Television New Zealand Ltd* [2001] 4 CLJ 722, I had the occasion to consider and determine the burden of proof cast on the plaintiff in an application for interlocutory injunction to restrain the presentation of a winding up petition, in the following words: I agree with the reasons given by the English and New Zealand Court of Appeal respectively and by Abdul Malik J and hold that for the purpose of obtaining an interim injunction to restrain the defendant from proceeding with the winding up petition, *the burden of proof cast on the plaintiff is only discharged by reference to the standard of proof or test in adducing evidence to establish a prima facie case and that the principle relating to the test of 'serious question to be tried'*in *American Cynamid Co v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504 as applied in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 *is not applicable as the applications there were not applications to restrain winding up petitions or proceedings, such as in the instant case before me. Illustration of a prima facie case may be provided by necessary evidence that there is a bona fide dispute by the plaintiff in relation to the statutory demand or that the plaintiff is solvent.* (Emphasis added.)

[61] This court is of the view that the quoted case does not come to the aid

of the plaintiff. The principle outlined in *Tan Kok Tong* can be summarised as follows:

(a) in order to grant an injunction to restraint a petition based on a statutory demand for a debt, the court must be satisfied that the debt is bona fide disputed on substantial grounds;

(b) the test of showing that there 'is a serious question to be tried' enunciated in *American Cynamid Co v Ethicon Ltd* [1975] AC 396 is not sufficient; and

(c) the burden of proof is only discharged if evidence to establish a prima facie case is made out. A prima facie case may be established if the evidence shows:

(i) a bona fide dispute of the statutory demand; or

(ii) the plaintiff is solvent.

[62] This court is of the considered view that the plaintiff has failed to establish a prima facie case as it did not show a bona fide dispute of the statutory demand. The s 466 notice was regularly issued and the debt was not a disputed debt.

[63] This court is also of the considered view that the solvency of the company while claimed to be a non-issue by the plaintiff, is not reflected in their actions. It was clearly established that the plaintiff had failed to honour two settlement agreements.

[64] No evidence was put forward that the said agreements were in any manner defective or unenforceable. It was plain refusal to abide by the agreement. As such, by conduct, the plaintiff demonstrated that they did not want to pay. The logical deduction based on this refusal to pay is that plaintiff is unable to pay. The reason may be due to their financial difficulty.

[65] Much has been said that the best way to prove commercial solvency is by paying the debt due. In the current case, it can be seen that there were two agreements to settle amounts claimed. What was clearly established was the fact that despite the defendants offering a reduction from the original amounts claimed, yet the plaintiff failed to honour the agreements. The best way to prove solvency is to pay. This court is of the view that claiming to be solvent but not acting in a manner consistent with such claim is a curious paradox.

[66] In *Klass Corp (M) Sdn Bhd v MKRS Management Sdn Bhd* [2018] 9 MLJ 305; [2018] 7 CLJ 303 Mohd Nazlan J succinctly explained what it takes to demonstrate that a company is commercially solvent and held as follows:

> Even if a debtor company could demonstrate ready availability of more than sufficient cash-flow and liquid assets as well as funds capable of paying its debts whenever they fall due, its refusal or neglect to actually make the payment available to the creditor, for any reason other than that the debt was bona fide disputed on substantial grounds or other valid bases, must still mean that the company failed to rebut the presumption of its insolvency. This would tantamount to the company not being commercially solvent and thus being unable to pay its debts for purposes of ss 465(1)(e) and (1)(a) of the CA. In the instant case, the plaintiff did not even seek to demonstrate that it was in any event commercially solvent (see paras 59, 60 & 64).

[67] This was compounded by the fact that the plaintiff failed to disclose its latest financial position with the Suruhanjaya Syarikat Malaysia. Without evidencing its financial position, the plaintiff had no authority to claim that its financial position was healthy. It was not difficult to do so. This meant that the plaintiff made only a bare assertion of its solvency.

[68] In *Aeon Big (M) Sdn Bhd v SSM Management Sdn Bhd* [2017] MLJU 1824; [2017] 1 LNS 998 Mohd Nazlan J held as follows:

> At the minimum, any company contending that it is not insolvent must produce its latest audited financial statements. It must then show from the assets available whether it is able to make payment of the debt being claimed as and when the debt is due. This, the respondent almost absolutely falls short of.

[69] The above considerations are more relevant to a winding up court than it is to this court. However, what the above discussion seeks to demonstrate is that the plaintiff has not established why it is entitled to any form of injunctive relief from this court.

[70] As such, there is no basis for this court to grant the consequential prayer sought by the plaintiff.

CONCLUSION

[71] In the final analysis, this court rules as follows:

(a) there is no basis to support the argument that the said s 466 notice was in any manner invalid and/or null and/or void. The s 466 notice was regularly issued and complied with the requirements established by the Federal Court in *Lai Yak Kee v Pembinaan Cemerlang*;

(b) there was clearly an undisputed debt established before this court; and

(c) that even if the court were to consider an injunction to be granted, the plaintiff failed to demonstrate it is entitled to one.

[72] Premised on the foregoing reasons, the application of the plaintiff to declare the s 466 notice as null and void as well as to restrain the filing of winding-up petition by the defendants cannot be sustained. Therefore, the plaintiff's originating summons in encl 1 is dismissed with cost of RM5,000.

The plaintiff's application dismissed with cost of RM5,000.

Reported by Kamarul Anwar